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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re KOBE G. et al., Persons Coming
Under the Juvenile Court Law.

B173915
(Los Angeles County
Super. Ct. No. CK 50378)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

REGINALD G.,

Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County.
Margaret S. Henry, Judge. Vacated and remanded.

Anna L. Ollinger, under appointment by the Court of Appeal, for Defendant and Appellant.

Lori A. Fields, under appointment by the Court of Appeal, for Minors.

Raymond G. Fortner, Jr., Acting County Counsel, Larry Cory, Assistant County Counsel, and Aleen L. Langton, Deputy County Counsel, for Plaintiff and Respondent.

* * * * *

This is an appeal by Reginald G., the father of Kobe G. and Maya G., from an order of the court denying his petition for modification under Welfare and Institutions Code section 388.¹ Reginald's petition sought to reinstate reunification services, and he sought the return of these children to his custody or, in the alternative, he sought an order liberalizing his visits. We vacate the court's order denying Reginald's petition and remand for further proceedings because the court did not comply with rule 1439 of the California Rules of Court, which requires notice to Indian tribes whenever an Indian child is subject to proceedings under section 300 et seq.

FACTS

1. General Background

Kobe and Maya were born to Jennifer B. in 2002. The children were ordered detained in the interest of their safety on October 15, 2002, and they were placed in foster care. During this hearing counsel for Jennifer and Reginald both stated that there was no "American-Indian heritage."

On March 8, 2004, the court found that returning the children to Jennifer would create a substantial risk to their safety, and to their physical and emotional health. In *Jennifer B. v. Superior Court*, No. B174470, filed on August 31, 2004, we denied the petition for a writ of mandate filed by Jennifer B. in which she sought to reverse the trial court's finding that there was a substantial risk of harm if the children were returned to her custody.

2. The Termination of Reunification Services for Reginald

In January 2003, the Department of Children and Family Services (DCFS) reported that Jennifer and Reginald commenced to live together in November 2002, but that Reginald repeatedly beat Jennifer. Jennifer was showing physical signs of this abuse, and there were seven incident reports, and two police reports, stating that there had been incidents of violence between Jennifer and Reginald. During this time, Reginald

¹ All further statutory references are to the Welfare and Institutions Code.

fathered another child with Jennifer, as well as yet another child with another woman. Reginald was not attending any programs to which DCFS had referred him, and he had seen Kobe and Maya only twice since their placement in a foster home.

In January 2003, the court ordered Reginald to undergo psychological evaluation in view of his tendency toward violence. The court reduced Reginald's monitored visits with Kobe and Maya to one per week but allowed DCFS to arrange for additional visits. Reginald failed to comply with the order regarding a psychological evaluation.

In February 2003, DCFS reported that Jennifer was stalking Reginald, and that Reginald continued to physically abuse Jennifer. In light of the danger to the children, the court declared Kobe and Maya to be dependents of the court and ordered reunification services. Reginald was again ordered to undergo psychological evaluation. He was given a minimum of three visits per week with the children.

At a hearing on August 8, 2003, DCFS reported that Reginald had limited contact with Kobe and Maya. DCFS reported that Reginald had not provided any information regarding the status of his progress with court ordered counseling.

Reunification services were terminated for Reginald on September 2, 2003. At the outset of the hearing held on September 2, 2003, Reginald stated that his great-grandmother was a "full-blooded" Indian. Reginald's counsel stated that the report of Jennifer's psychological evaluation reflected that Reginald was "half Indian." This was based on a statement in the psychologist's report, quoting Jennifer, that Reginald was "black and American Indian." The court ordered that DCFS "investigate the father's American Indian heritage." However, this was not done. DCFS concedes that "notice was never complied with as ordered by the juvenile court on September 2."

During the hearing on September 2, 2003, DCFS reported that Reginald had signed up for parent education and counseling. Reginald testified that his infrequent visits with Kobe and Maya was a poor decision, but that he had now changed his mind and wanted to visit as often as possible. However, the court found that Reginald's progress with court-ordered programs was unsatisfactory and that he had not regularly visited the children. The court observed that Reginald had "done nothing." The court

also found that Reginald had not demonstrated the ability and capacity to complete the treatment plan. The court terminated family reunification services for Reginald.

3. Reginald's Section 388 Petition

In December 2003, Reginald filed a section 388 petition in which he alleged as changed circumstances that he had completed a 40-hour parenting class and over 20 hours of instruction in anger management. He also alleged that he had consistently visited Kobe and Maya, and that the children called him “daddy.”

In January 2004, DCFS confirmed that Reginald had completed 56 hours of parenting classes, though he need only 40 to complete the program, and that he needed 104 hours to complete the program on anger management. DCFS also reported that Reginald had begun to visit regularly with Kobe and Maya. According to DCFS, Reginald had three misdemeanor convictions for grand theft vehicle, false identification to peace officers and driving with a suspended license, but DCFS noted that these were not violent felonies.

In February 2004, DCFS forwarded a letter from the shelter where Jennifer had been staying that reported renewed physical abuse of Jennifer by Reginald and the use of drugs by both Jennifer and Reginald. DCFS reported that it had originally intended to support Reginald's section 388 petition, but was now opposed because Kobe and Maya were attached to their foster parents and Reginald, in DCFS's opinion, would not be able to complete his requirements on time.

Reginald's section 388 petition came on for a hearing on February 22, 2004. It was stipulated that Reginald had a total of 12 visits with Kobe and Maya since November 5, 2003. Edgar Locatt, a social worker, was called by Reginald and testified that he had monitored about 10 or 11 visits with Kobe and Maya. Locatt had also observed Reginald with Reginald's other child with Jennifer. Locatt thought that returning Kobe and Maya to Reginald would be overwhelming to Reginald. Locatt also thought that it was too soon for unmonitored visits. Before recommending unmonitored visits, Locatt wanted to be sure that the children were not at risk. Locatt was concerned for the children's safety because bench warrants had been issued for Reginald on several

occasions, one of which was for threats with intent to terrorize. Locatt was also aware of a charge of willful cruelty to a child that had been made against Reginald in 2002, a charge that arose out of an incident where Reginald's eight-year old daughter was involved in an accident in a car. Locatt stated that Kobe and Maya had bonded very well with their foster parents, that they referred to their foster father as their father, and that it was in the children's best interests to remain with the foster parents. Locatt was concerned that Reginald had not enrolled in individual counseling, and that he had not complied with the order requiring him to undergo psychological evaluation.

Reginald testified that he did not know about the order requiring him to undergo psychological evaluation, even though he was present in court when the order was made. Reginald stated that he felt he was capable of caring for three small children, i.e., Kobe and Maya, and the other child he had with Jennifer.

The court took into consideration three DCFS reports, as well as documentation that showed that Reginald had participated in parenting, and anger management classes. The January 2004 report by DCFS related that the minors' maternal grandparents reported they had serious concerns about Reginald caring for any child. The maternal grandfather, a registered nurse, stated that Reginald had a seizure disorder that disqualified him from driving, but that he drove anyway without a license. The grandfather had also observed Reginald in a violent altercation with Jennifer, which prompted a call to the police, and which caused the grandfather to take Jennifer to a motel. Both grandparents felt that neither Reginald nor Jennifer should have custody of the children, and that they should be left with their foster parents. The February 2004 DCFS report related further violence between Jennifer and Reginald, with Reginald hitting, kicking, choking and dragging Jennifer by the hair across the floor.

In ruling on the petition, the trial court stated that it had serious concerns about Reginald's psychological makeup. The court found that Reginald had not shown a change in circumstances and denied the petition. Reginald appeals from the order denying his petition under section 388.

DISCUSSION

1. The Juvenile Court Did Not Err in Denying Reginald's Section 388 Petition

“The petitioner requesting the modification under section 388 has the burden of proof.” (Cal. Rules of Court, rule 1432(f).) “If the petition states a change of circumstance or new evidence *and* it appears that the best interest of the child may be promoted by the proposed change of order or termination of jurisdiction, the court may grant the petition after following the procedures in subdivisions (d) and (e).” (Cal. Rules of Court, rule 1432(c), *italics added*.) The determination of a section 388 petition is committed to the “sound discretion of the juvenile court, and the trial court’s ruling should not be disturbed on appeal unless an abuse of discretion is clearly established.” (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)

Reginald contends that he met his burden to show that there was a change in circumstances by attending parenting classes, and by visiting the children 12 times. All of these alleged changes occurred after reunification services were terminated. Considering that prior to the termination of reunification services Reginald ignored all treatment programs and rarely visited the minors, his new approach to these responsibilities after September 2003 could only be welcomed.

However, this does not mean that there was a change in circumstances where it mattered most. The juvenile court was justifiably concerned about what it termed Reginald’s “psychological make up” and ordered a psychological evaluation early in the case. In denying Reginald’s petition, the trial court noted that Reginald never complied with this order, even though he admitted that he was present in court on both occasions when this order was entered. Unfortunately, the need for a psychological evaluation was underlined by the extreme violence that Reginald inflicted on Jennifer, even after the termination of unification services. There was no change in Reginald’s propensity for violence, which is a clear and present danger to persons who are helpless and vulnerable, including the minors. Locatt’s concern for the safety of the children is validated by the circumstance that did not change, i.e., Reginald’s violence which remains unexplained, untreated and apparently ungovernable.

Given these circumstances, Reginald cannot show that the modification he seeks is in the best interests of the minors. In fact, the best interests of the minors require the opposite of the modification that Reginald seeks. The children are prospering with their foster parents, and would be at risk with Reginald. The juvenile court's management of this troubled case is correct, and well within the exercise of its sound discretion.

However, even though we find that the order denying Reginald's petition under section 388 should be sustained on the merits, we must vacate it and remand for additional proceedings, as we explain in part 2 below.

2. The Juvenile Court's Order Must Be Vacated and the Case Must Be Remanded for Compliance with Rule 1439

Rule 1439 of the California Rules of Court² requires notice to Indian tribes of proceedings whenever an "Indian child" is subject to proceedings under section 300 et seq. Rule 1439 implements the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.), which is designed "to promote the stability and security of Indian tribes and families by establishing minimum standards for removal of Indian children from their families and placement of such children 'in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.' [Citations.]" (*In re Marinna J.* (2001) 90 Cal.App.4th 731, 734.) Notice under rule 1439 is mandatory and "ordinarily failure in the juvenile court to secure compliance with the [Indian Child Welfare] Act's notice provisions is prejudicial error. The only exceptions lie in situations where 'the tribe has participated in the proceedings or expressly indicated [it has] no interest in the proceedings.'" (*In re Marinna J., supra*, at p. 736.) Strict compliance with the notice requirement is mandatory no matter how late in the proceedings a child's possible Indian heritage is uncovered. (*In re Jonathan D.* (2001) 92 Cal.App.4th 105, 109.)

² All further references to rules are to the California Rules of Court.

DCFS concedes that the absence of notice requires “a remand to the juvenile court with directions to follow ICWA [Indian Child Welfare Act] notice provisions.” However, DCFS contends that there is nothing that prohibits this court from affirming the juvenile court’s order denying Reginald’s section 388 petition, while at the same time the case is remanded to comply with the notice provisions of rule 1439.

Under its terms, rule 1439 “applies to all proceedings under section 300 et seq., including detention hearings, jurisdiction hearings, disposition hearings, reviews, hearings under section 366.26, and subsequent hearings affecting the status of the Indian child.” (Rule 1439(b).) Proceedings under a section 388 petition come within this definition, and DCFS does not contend otherwise. Under rule 1439, if it is determined that the Indian Child Welfare Act applies, “the juvenile court shall not proceed until at least 10 days after those entitled to receive notice under the Act have received notice.” (Rule 1439(h).)

Rule 1439(f) requires notice “of the pending petition and the right of the tribe to intervene in the proceedings.” Receiving notice after the proceedings have terminated, as Reginald’s section 388 petition has been terminated, is obviously not what is intended by the Indian Child Welfare Act, nor by rule 1439. We cannot affirm proceedings that violated rule 1439. Thus, we cannot agree with DCFS that we should affirm the order denying Reginald’s section 388 petition.

DCFS cites *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1413-1414, in support of its suggestion that this court should affirm the order denying Reginald’s petition, and remand with directions “to follow ICWA notice provisions.” However, *In re Antoinette S.* does not authorize such a course of action. In *Antoinette S.*, DCFS’s counterpart sent a comprehensive notice to the Bureau of Indian Affairs³ prior to the termination hearing. In response to the notice, the Bureau of Indian Affairs reported that no Indian heritage could be traced to the child. The matter of Indian ancestry was not

³ If the identity of the Indian parent or tribe cannot be determined, notice is to be given to the Secretary of the Interior. (Rule 1439(f)(4).)

raised at the termination hearing, and for this reason the trial court did not address this issue. A divided appellate court concluded that there was a minimal showing that the child was an Indian child and that this triggered the notice requirement. However, the court concluded that the Bureau of Indian Affairs' response that no Indian heritage could be traced to the child rendered the error harmless. (*Ibid.*)

In the case at bar, the matter of Indian ancestry was raised at the hearing that resulted in the termination of unification services, and the court directed DCFS to investigate Reginald's American-Indian heritage. However, DCFS concededly failed to do so. Unlike in *In re Antoinette S.*, there is nothing of record, much less a report of the Bureau of Indian Affairs, that bears on the issue of the children's Indian ancestry.

While the juvenile court needs "only a suggestion of Indian ancestry" to trigger the notice requirement (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 848),⁴ it is true that notice is not required where the information provided is too vague and speculative. (*In re O.K.* (2003) 106 Cal.App.4th 152, 157-158.) In the case at bar, the trial court made no determination on the sufficiency of the evidence to require notice under rule 1439. However, since the record before us contains a suggestion of Indian ancestry, we remand the case for further proceedings that are consistent with rule 1439.

The question arises what impact rule 1439 has on previous proceedings under section 300 et seq. affecting Kobe and Maya. We agree with the court in *In re Antoinette S.*, *supra*, 104 Cal.App.4th at pages 1409-1411, that the failure to comply with the notice provisions of rule 1439 is not jurisdictional in the fundamental sense. That is, failure to comply with rule 1439 does not divest the juvenile court of subject matter jurisdiction, although it is "serious legal error." (*In re Antoinette S.*, *supra*, at p. 1410.) As noted by the court in *Antoinette S.*, this squares with the fact that sometimes violations of the notice provisions of the Indian Child Welfare Act are deemed harmless (e.g., *In re*

⁴ Rule 1430(f)(5) provides that: "Notice shall be sent whenever there is reason to believe the child may be an Indian child, and for every hearing thereafter unless and until it is determined that the child is not an Indian child."

Kahlen W. (1991) 233 Cal.App.3d 1414, 1424), which indicates that the error is not jurisdictional. It is also true that if a violation of rule 1439 were jurisdictional, children might have to be returned to parents who “have demonstrated at least temporary unfitness.” (*In re Antoinette S.*, at p. 1411.) Moreover, it appears that “the remedy Congress provided for violations of the ICWA was not to void that jurisdiction and transfer the matter to tribal courts but rather to allow parents and tribes to seek invalidation of any proceedings held in error. [Citing inter alia 25 U.S.C. § 1914.⁵]” (*Ibid.*)

In light of the fact that the error was not jurisdictional, the failure to comply with rule 1439 does not void the proceedings that were held on Reginald’s section 388 petition. Apart from the noted error that must be remedied, for the reasons set forth in part 1, the juvenile’s court’s ruling on Reginald’s section 388 petition was correct and within the scope of its discretion. However, we remand the matter in order for the juvenile court to comply with rule 1439.

DISPOSITION

The order denying Reginald’s petition under section 388 is vacated and the matter is remanded to the juvenile court with directions to order compliance with rule 1439. If, after proper inquiry and notice, no response is received from a tribe indicating that Kobe and Maya are Indian children, the juvenile court’s order denying Reginald’s petition shall be reinstated. If a tribe determines that Kobe and Maya are Indian children, or if other information is presented to the juvenile court that suggests the minors are Indian children

⁵ 25 U.S.C. § 1914 provides: “Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child’s tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, , and 1913 of this title.”

as defined by rule 1439, the juvenile court is ordered to conduct a new hearing on Reginald's section 388 petition in conformity with rule 1439.⁶

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FLIER, J.

We concur:

COOPER, P.J.

RUBIN, J.

⁶ Our disposition is patterned on cases where failure to comply with rule 1439 was cured, as in this case, by remanding the case with directions. (E.g., *In re Marinna J.*, *supra*, 90 Cal.App.4th 731, 740.)